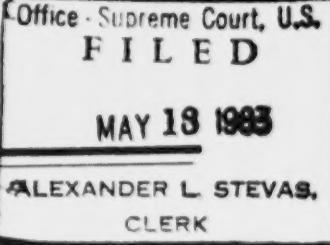


82 - 1892

NO.



In the
Supreme Court of the United States

OCTOBER TERM, 1982

HAYES OILFIELD CONSTRUCTION, INC.,

Petitioner

VERSUS

UNITED STATES FIDELITY &
GUARANTY COMPANY

Respondent

ON PETITION FOR WRIT OF CERTIORARI TO THE
UNITED STATES COURT OF APPEALS FOR THE
FIFTH CIRCUIT

PETITION FOR WRIT OF CERTIORARI

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QUESTIONS PRESENTED FOR REVIEW

Petitioner submits that its application for a Writ of Certiorari to the Court of Appeals for the Fifth Circuit presents the following questions for review.

1. Whether the decision of the Court of Appeals effectively denied petitioner its right to a jury trial as provided by the Seventh Amendment of the Constitution of the United States.
2. Whether the Court of Appeals went beyond the scope of appellate review by reversing the jury's verdict on the basis of an issue which was never really presented at the trial of this matter.

LIST OF INTERESTED PARTIES

Hayes Oilfield Construction, Co., Inc.

Mattie Hayes

Rufus Hayes

Ed Hayes

United States Fidelity & Guaranty Company

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PETITION FOR WRIT OF CERTIORARI

DECISIONS BELOW

The opinion of the United States District Court for the Eastern District of Louisiana is not reported. The opinion of the United States Court of Appeals for the Fifth Circuit is reported under the title "Ezell vs. Hayes Oilfield Construction Company, Inc." at 693 F.2d 489 (5th Cir. 1982).

JURISDICTION

Petitioner seeks a writ to the United States Court of Appeals for the Fifth Circuit to review its Decision and Order filed on December 13, 1982. An application for rehearing was denied by the Court of Appeals in an order entered on

January 17, 1983. This court has jurisdiction pursuant to 28 USC §1254(1). On April 13, 1983 Justice White extended the time within which to file a Petition for Writ of Certiorari to May 18, 1983.

CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

1. The Seventh Amendment to the United States Constitution provides:

In Suits at common law, where the value in controversy shall exceed twenty dollars, the right of trial by jury shall be preserved, and no fact tried by a jury, shall be otherwise re-examined in any Court of the United States, than according to the rules of common law.

2. The Jones Act, 46 U.S.C. §688 reads as follows:

Recovery for injury to or death of seaman

Any seaman who shall suffer personal injury in the course of his employment may, at his election, maintain an action for damages at law, with the right of trial by jury, and in such action all statutes of the United States modifying or extending the common-law right or remedy in cases of personal injury to railway employees shall apply; and in case of the death of any seaman as a result of any such personal injury the personal representative of such seaman may maintain an action for damages at law with the right of trial by jury, and in such action all statutes of the United States conferring or regulating the right of action for death in the case of railway employees shall be applicable. Jurisdiction in such actions shall be under the court of the district in which the defendant employer resides or in which his principal office is located.

3. The Longshoremen's and Harbor Workers' Compensation Act provides in relevant part at 33 U.S.C. §905(a):

...if an employer fails to secure payment of compensation as required by this Act an injured employee...may elect to claim compensation under the Act or to maintain an action at law or in admiralty for damages on account of such injury or death.

4. Title 28 of the United States Code provides in §1254:

Courts of appeals; certiorari; appeal; certified questions

Cases in the courts of appeals may be reviewed by the Supreme Court by the following methods:

(1) By writ of certiorari granted upon the petition of any party to any civil or criminal case, before or after rendition of judgment or decree;

(2) By appeal by a party relying on a State statute held by a court of appeals to be invalid as repugnant to the Constitution, treaties or laws of the United States, but such appeal shall preclude review by writ of certiorari at the instance of such appellant, and the review on appeal shall be restricted to the Federal questions presented,

(3) By certification at any time by a court of appeals of any question of law in any civil or criminal case as to which instructions are desired, and upon such certification the Supreme Court may give binding instructions or require the entire record to be sent up for decision of the entire matter in controversy.

5. The Louisiana Bar Association Committee on Professional Responsibility Opinion Number 342 reads:

The opinion of the Committee has been requested as to the propriety of the following:

"Where the insurer either denies coverage to the insured or reserves its rights to do so subsequently, may the same attorney properly represent both the insured and the insurer?"

Under the circumstances presented, the Committee is of the opinion that it would be improper, with or without the consent of all parties concerned, for the same attorney to represent both the insurer and the insured.

The Committee is compelled to this conclusion based upon its belief that once the insurer decides to assert a coverage defense, the same attorney may not represent both the insured and the insurer. Canon 5 and, to some extent, Canon 7, would militate against such dual representation. EC 5-1 provides that the attorney's professional judgment should be exercised "solely for the benefit of his client and free of compromising influences and loyalties," including "interests of other clients." EC 5-14 states that an attorney cannot represent two clients with "conflicting, inconsistent, diverse, or otherwise discordant" interests. And EC 5-15 indicates that counsel "should resolve all doubts against the propriety of the representation."

The Committee feels that when coverage is disputed, the interests of the insured and the insurer are always divergent. The attorney should not be placed in the position of divided loyalties. Such an arrangement would be adverse to the best interests of the insured, the insurer, the attorney, and the profession.

Therefore, the Committee is of the opinion that the same attorney could not, under the circumstances presented, properly represent both the insurer and the insured.

STATEMENT OF THE CASE

At about 8:00 o'clock A.M. on April 26, 1978 Ronnie Ezell (Ezell), plaintiff, and an employee of Hayes Oilfield Construction Inc. (Hayes), entered the kitchen of Mattie Hayes, one of the owners of Hayes, and reported to her that he had injured himself while handling pipe in Hayes' yard adjacent to the Hayes' residence in Brookhaven, Mississippi.

In accordance with the compensation law of the State of Mississippi, Hayes completed an employer's first report of injury which it filed with the Mississippi Compensation Commission. The cause of the accident according to this form was "unloading pipe" and the location of accident was designated as on the employer's premises at "Brookhaven, Lincoln, Mississippi."

On April 27, 1978, Ezell was seen by Dr. Joe Hillman of Brookhaven to whom he gave a history of sustaining an injury while "picking up heavy pipe." On May 4, 1978, Ezell gave a similar history to Dr. W. J. McCraney.

On May 23, 1978, Ezell executed a form entitled "Memorandum of Agreement as to Payment of Compensation" which apparently is a condition precedent to the receipt of compensation pursuant to the Mississippi Workmen's Compensation Law. This agreement was executed in the presence of two witnesses and reflects the nature of the injury to be "strained back loading pipe." Pursuant to this agreement and plaintiff's previous assertion that he was injured at Hayes' yard in Brookhaven, benefits commensurate to the Mississippi Workmen's Compensation Law were instituted by United States Fidelity & Guaranty Company (USF&G), Hayes' workmen's compensation insurer.

On June 5, 1978, Ezell filed suit in the United States District Court for the Eastern District of Louisiana claiming he suffered injuries on April 24, 1978 while employed as a seaman by Hayes in the marsh of south Louisiana while "unloading 100 pound bags of cement from a flat barge lowered to defendant's vessel." Also named as defendants were Marion Oil Company, the well owner and insured of USF&G; Diamond M Company, the drilling contractor; and Halliburton Company. Jurisdiction in the District Court was based on The Jones Act, 46 U.S.C. §688.

The suit against Hayes was duly forwarded to USF&G which responded to Hayes on November 10, 1980 that Hayes was not covered "for any claims under maritime law, specifically under the Longshoremen's & Harbor Workers' Act or Jones Act." In that same letter, USF&G stated, "you are respectfully advised that you are to undertake defense of this suit on behalf and at your own expense." USF&G has consistently maintained this position throughout the course of these proceedings.

On November 20, 1980, USF&G wrote to the Mississippi Workmen's Compensation Commission and advised that it had discontinued "all compensation benefits as we have apparently been misled by either the claimant or our insured as to the whereabouts of this accident."

On December 6, 1978, USF&G cancelled all insurance which it carried for Hayes and notified all of Hayes' customers that required certificates of insurance that such cancellation had been made. This cancellation seriously affected Hayes' business, causing a complete loss of some customers, and a substantial loss of business from others.

In his deposition of January 9, 1979, Ezell claimed he lied when he said he was hurt in Mississippi because the head

of Hayes Oilfield Construction told him to because Hayes either had no insurance coverage for accidents occurring in Louisiana or because a Louisiana accident would cause Hayes' insurance rates to increase.

On February 16, 1979, Hayes filed a third-party complaint against USF&G in which Hayes contended that USF&G provided coverage for Ezell's demands and that USF&G accordingly was obligated to respond to Ezell's demands, to pay any judgment against Hayes and to reimburse Hayes for the monies which it was expending in defending against Ezell's claim.

USF&G answered the third-party demand and denied coverage under the grounds that its policy "was specifically limited to the geographic territory of the State of Mississippi." USF&G also alleged in its sixth defense that Ezell and Hayes both had made "material misrepresentations" on "numerous occasions" and "all in fraud on third-party defendant USF&G." Fraud was not pled as an affirmative defense as required by Rule 8(c) of the Federal Rules of Civil Procedure in this pleading or in any subsequent pleading.

Interrogatories and requests for production were propounded to USF&G seeking the details of Hayes' alleged fraud and documents in support thereof. No response was ever received to either pleading.

As of October 30, 1979, depositions had been taken from all of plaintiff's co-employees and from Mr. Nippert, the Marion petroleum engineer present on the rig at the time of plaintiff's alleged accident. According to these depositions, none of the witnesses deposed saw plaintiff get hurt, none observed him to be hurt, none heard him complain about being hurt, and none observed anything out of the ordinary

about him on the job or while riding home with him from the job. At this juncture, Ezell's story that he was told to lie was completely refuted and the occurrence of a Louisiana accident was extremely doubtful.

After these witnesses were pinned down to the fact that plaintiff had suffered no accident at the time complained of in this law suit, counsel for USF&G sought to break down this testimony by attempting to prove that the witnesses could have been mistaken, that plaintiff could have been hurt without the witnesses knowing it, that plaintiff could have complained about his injury without the witnesses hearing him, etc.

On April 16, 1980, the court denied USF&G's motion for summary judgment that its policy did not cover an accident in Louisiana and maintained Hayes' counter motion for summary judgment that "the claim for damages by the plaintiff in the main demand is covered by the policy of insurance written by USF&G."

On April 30, 1980, counsel for Hayes wrote counsel for USF&G requesting an answer prior to the preliminary conference scheduled for May 6, 1980, as to whether USF&G would assume Hayes' defense in accordance with the court's ruling of April 16, 1980. No response was forthcoming.

A similar letter was sent to USF&G on May 6, 1980 and again no response was forthcoming.

On May 29, 1980, in accordance with its previous ruling on summary judgment, the court entered judgment ordering that its previous ruling:

"...is the final judgment, in this action, in favor of

Hayes Oilfield Construction Company, Inc. and against USF&G declaring that the policy of insurance issued by USF&G to Hayes Oilfield Construction Company, Inc. provides coverage to Hayes for the claims asserted by the plaintiff in the main demand."

USF&G took no appeal from that judgment.

On August 11, 1980, Hayes wrote USF&G advising that the court's judgment of May 29, 1980 was final and urged USF&G to assume Hayes' defense in accordance with the court's judgment or to advise Hayes as to its intentions. No response was received.

In the pre-trial order submitted to the court for the pre-trial conference of January 20, 1981, USF&G contended it had no liability to Hayes "whether the plaintiff's injury occurred offshore Louisiana as claimed by plaintiff or in the Brookhaven yard as claimed by numerous defendants." In Contested Issues of Fact (L), USF&G also contested whether it insured Hayes if Ezell was injured offshore.

USF&G's Contested Issues of Fact (M) accused Hayes of fraud by inquiring:

"Whether fraud has been committed upon USF&G's interest."

In Contested Issues of Fact (K) USF&G contended plaintiff's accident occurred in Hayes' yard in Brookhaven, Mississippi.

By Minute Entry of January 20, 1981, the court struck as a contested issue of fact whether USF&G insured Hayes

for the claim made by Ezell. Despite this, USF&G still refused to defend Hayes and continued to deny coverage up to February 2, 1981, seven days before trial when USF&G settled Ezell's claim on behalf of Marion Oil Company. Moreover, according to the pre-trial order prepared for the trial of this case, USF&G's only defense to Hayes' claim as set forth in paragraph 6(d) of the pre-trial order stated as follows:

"It has no liability to Hayes Oilfield Construction Company whether the plaintiff's injury occurred in offshore Louisiana as claimed by plaintiff or in the Brookhaven yard of Hayes as claimed by numerous defendants."

Two working days prior to the trial, USF&G amended the pre-trial order to allege a defense of refusal to defend on the grounds that there existed a conflict of interest in that if Ezell's seaman status was contested, he would then be forced to assert his status as a longshoreman; this would be contrary to Hayes' interest because Hayes (according to USF&G) did not have insurance coverage for longshore claims.

This amended pre-trial order was filed into the record on February 11, 1981, after the conclusion of the trial. Moreover, at the trial of this matter, USF&G did not introduce the issue of conflict of interest during opening argument, no evidence concerning said conflict was introduced at trial and the issue was touched upon only briefly by USF&G in closing argument.

At the conclusion of the trial, the jury rendered its verdict in favor of Hayes. It awarded \$2,244.26 in attorney's fees and expenses over the \$17,611.30 to which the parties had stipulated prior to the trial. In addition, as the parties had stipulated Mississippi law would be applied in deciding the

issues between Hayes and USF&G, the jury awarded Hayes \$2,000,000.00 in punitive damages.

On February 20, 1981, USF&G filed a motion for judgment n.o.v., in the alternative, a motion for a new trial, or in the further alternative, a motion for remittitur. The district court entered judgment in accordance with the jury's verdict on February 27, 1981. A minute entry was entered on March 18, 1981 denying USF&G's motions while reserving the right of the district court to rule on the question of remittitur. On March 30, 1981, this minute entry was vacated and stayed pending the district court's ruling on remittitur.

On April 29, 1981, a minute entry was entered remitting the punitive damage verdict to \$500,000.00. On December 13, 1982, the Fifth Circuit Court of Appeals reversed the remitted punitive damage award and, on January 17, 1983, denied Hayes' petition for rehearing.

ARGUMENT

After hearing all of the evidence, reviewing all of the exhibits and observing the demeanor of all of the witnesses, the jury was presented with the following interrogatory:

"2. Do you find the defendant, USF&G had a legitimate or arguable reason for not assuming the defense of its insured, Hayes Oilfield Construction, Inc."

The jury, answering in the negative, found that USF&G had no legitimate or arguable reason for not assuming the defense of its insured, Hayes Oilfield Construction, Inc. with respect to the Jones Act suit by Hayes' employee, Ezell, against Hayes and awarded punitive damages in the amount

of \$2,000,000.00. When the jury was polled, each juror individually confirmed the verdict.

On appeal, however, the court reversed the jury's finding and, citing the conflict of interest allegedly created by exclusion (f) of the policy in question stated that:

"Given this conflict, we hold that USF&G's refusal to assume Hayes' defense was reasonable as a matter of law. Because USF&G's actions were reasonable and punitive damages may not be assessed for a reasonable refusal to defend, it was an error to allow the issue of punitive damages to go to the jury."

While "it is axiomatic that the scope of review of the legal effect given to accepted fact is much broader than the clear and erroneous standard," *Western Beef, Inc. vs. Compton Investments Co., et al*, 611 F.2d 587 (5th Cir. 1980), the evidence that was presented to the jury does not support the court's treatment of the conflict of interest issue as a matter of law. The language of the decision appears to infer presumption on the part of the court that USF&G merely refused to assume Hayes' defense on the grounds of conflict of interest and that the jury awarded punitive damages having determined that the conflict of interest did not constitute reasonable grounds for such a refusal.

This presumption does not conform to the "accepted facts" as they appear in the record of this case. On the contrary, a review of the evidence presented to the jury reveals that the alleged conflict of interest was never asserted by USF&G as a real basis for refusing to defend Hayes but was only offered at the very last minute as a rationalization for its otherwise unreasonable refusal to defend. As the record

shows, the real issue before the jury in this matter was not whether a conflict of interest reasonably precluded USF&G from defending Hayes against plaintiff's main demand, but whether USF&G's refusal to defend was, in fact, predicated upon the existence of the alleged conflict.

A careful review of the trial court record reveals the following:

On March 16, 1979 Hayes filed a third-party complaint which alleged that because Louisiana operations were incidental and necessary to Hayes' Mississippi operations, USF&G had a duty to defend. USF&G, on April 12, 1979, answered Hayes' third-party complaint and refused to defend on the grounds that coverage under the policy was limited to Hayes' operations in Mississippi. USF&G, in its answer, also accused Hayes of materially misrepresenting the date and location of the accident, "all designed to induce third-party defendant to render coverage for the compensation liability of third-party plaintiff all in fraud on third-party defendant, and all at variance to the contract of insurance in effect." USF&G made no mention of the conflict of interest as grounds for its refusal to defend Hayes.

On March 10, 1980, USF&G filed a motion for summary judgment exclusively on the grounds that plaintiff's injury was not covered by the insurance policy in effect at the time of his accident. USF&G made no mention of a conflict of interest as grounds for its refusal to defend Hayes.

On March 27, 1980, Hayes filed a motion for summary judgment which asserted coverage of plaintiff's claim under the policy. On April 8, 1980, USF&G filed its memo in opposition to Hayes' motion. Again, USF&G asserted the lack of coverage under the policy. USF&G made no mention

of the conflict of interest as grounds for its refusal to defend Hayes.

Only two working days prior to the trial, USF&G amended the pre-trial order to raise the defense of conflict of interest. However, the amended pre-trial order was not filed into the record of this case until February 11, 1981, after the conclusion of the trial. Moreover, at the trial of this matter, the defense of conflict of interest was not raised by USF&G during opening argument, no evidence was introduced concerning said conflict of interest, and the conflict of interest defense was raised only at the conclusion of the trial when counsel for Hayes argued that USF&G's reliance on the alleged conflict was spurious and misleading in light of the facts of this case.

During the course of the trial, these pleadings which proved that USF&G's continuous refusal to defend Hayes was based exclusively on the grounds of lack of coverage and which made no mention of any conflict of interest were admitted into evidence and presented to the jury for its consideration.

In addition, through oral testimony at trial, the jury was presented with the following facts:

"A. That prior to commencing its Louisiana operation, Hayes had discussed the operation with USF&G's insurance agent who assured him that the operation was covered under the policy.

B. That Hayes was not notified by USF&G of its contention that there was no coverage until plaintiff had filed his law suit.

C. That USF&G cancelled Hayes' insurance cov-

erage and notified all of Hayes' customers that the insurance has been cancelled, causing Hayes a significant loss of business.

D. That USF&G, while accusing Hayes of colluding with plaintiff to defraud USF&G, presented no evidence to substantiate that claim and did not respond to Hayes' interrogatories and request for production of documents whereby Hayes sought to ascertain the facts upon which the claim of fraud was based.

E. That throughout the course of the proceedings and even subsequent to the court's entry of judgment that there was coverage, USF&G continued to refuse to defend exclusively on the grounds that there was no coverage under the policy.

F. That while USF&G contended that its post-judgment position was that it would pay any judgment rendered against Hayes as well as the cost of defense, Hayes was never notified that this was USF&G's position. Instead, Hayes was merely and continuously reminded of USF&G's refusal to defend exclusively on the grounds that there was no coverage under the policy."

Given this evidence, it is clear that from the time plaintiff filed his suit until counsel for USF&G finished his closing argument to the jury, it was USF&G's position that it would not defend Hayes because there was no coverage under the policy. Furthermore, evidence contained in the record of the trial makes it abundantly clear that USF&G's last-minute argument that a conflict of interest was the basis for its refusal to defend Hayes was spurious and wholly unrelated to the true issue that was before the jury.

Plaintiff, in his original complaint, asserted seaman

status under the Jones Act and claimed that his accident took place in a south Louisiana marsh rather than at the Hayes' yard in Brookhaven, Mississippi. The USF&G policy issued to Hayes unquestionably covered the plaintiff's alleged accident whether it occurred in Mississippi or in Louisiana because it expressly covered all accidents:

“(a) sustained in the United States of America, its territories or possessions, or Canada by any employee of the insured arising out of and in the course of his employment by the insured either in operations in [Mississippi] or in operations necessary or incidental thereto.”

Moreover, the trial court had issued a final judgment that plaintiff's accident, as alleged in the main demand, was in fact covered by the insurance policy in question.

Plaintiff, in his original petition, asserted his status as a Jones Act seaman. Moreover, this assertion was never challenged by USF&G, which actually settled plaintiff's claim without contesting his status as a seaman. Nevertheless, without any evidence in the record to support its position, the Court of Appeals noted the existence of a conflict of interest which concerned USF&G's inability to properly defend Hayes against plaintiff's main demand. According to the Court of Appeals, in order to defend Hayes, USF&G would have had to attack plaintiff's Jones Act status. Were USF&G successful, however, it would have, of necessity, proved plaintiff to be a longshoreman thereby exposing Hayes to damages which were not covered under its policy of insurance with USF&G; as such, USF&G could not defend Hayes against plaintiff's main demand because to do so properly would, ultimately, have been detrimental to Hayes' interests. As such, USF&G had no choice but to refuse to defend Hayes

in order to best serve and protect Hayes' interests.

USF&G's refusal to defend Hayes on the grounds that it had Hayes' best interests in mind is clearly refuted by the evidence contained in the record. As the evidence shows, plaintiff claimed that his main demand arose out of an accident which took place in Louisiana. Undertaking its own defense, Hayes, through the deposition testimony of plaintiff's co-workers, effectively proved that no such accident ever occurred. Since plaintiff's accident did not occur in Louisiana, it had to have occurred in Mississippi and was, therefore, clearly within the coverage of the insurance policy issued by USF&G to Hayes. For this reason, USF&G, by cross-examining plaintiff's co-workers at their depositions, attempted to subvert and destroy Hayes' successful affirmative defense and prove that the accident occurred in Louisiana in order to deny coverage under the policy.

Moreover, Hayes was never able to confront the issue of alleged conflict because there was nothing in the record on this point. Nevertheless, even if plaintiff's seaman status had been denied by the trial court, the policy of insurance issued to Hayes still provided coverage for a claim by plaintiff under the Longshoremen's & Harbor Workers' Compensation Act.

As Hayes had not procured LHWCA insurance, an action against Hayes in which plaintiff was deemed a longshoreman would have been governed by 33 USC §905(a):

"...if an employer fails to secure payment of compensation as required by this Act an injured employee...may elect to claim compensation under the Act or to maintain an action at law or in admiralty for damages on account of such injury or death."

The claim for damages under this provision would have been included under Coverage (B) of Hayes' policy. In *Russell vs. Atlantic & Gulf Stevedores*, 625 F.2d 71 (5th Cir. 1980) and *Parker vs. South Louisiana Contractors, Inc.*, 539 F.2d 113 (5th Cir. 1976), the court held that a claim for damages under 33 USC §905 of the LHWCA is not a claim arising out of the LHWCA and, instead, is nothing more than a damage claim. See, also *Harris vs. Olympus Terminals & Transport Co., Inc.*, 516 F.2d 922 (5th Cir. 1975); *Garcia vs. Queen, Ltd.*, 487 F.2d 625 (5th Cir. 1973) and *Voisin vs. Ocean Protein, Inc.*, 321 F.Supp. 173 (E.D.LA. 1970).

Plaintiff's potential claim for damages under 33 USC §905(a) is identical to the claim in *Parker* and *Russell*. It is not a claim under the workmen's compensation law but is, rather, nothing more than a claim for damages. As such, Coverage B of the insurance policy in question was here applicable.

Considering USF&G's continuous refusal to defend Hayes on the grounds that there was no coverage under the policy as well as its concern for Hayes' best interests as evidenced by its siding with plaintiff in the main demand, it is apparent that the real question before the jury was not whether a conflict of interest reasonably precluded USF&G from defending Hayes (a conclusion of law), but whether USF&G's refusal to defend was, in fact, predicated upon the existence of the alleged conflict (a question of fact).

In *Van Ooteghen vs. Gray*, 628 F.2d 488 (5th Cir. 1980), the court noted that recent Supreme Court cases in the area of employment discrimination have treated the question of the employer's motivation as one of "subsidiary" fact, subject only to "clearly erroneous" review rather than one of ultimate fact, subject to plenary review. The court further

noted that "it is improper for an appellate court to subvert the clear mandate of Rule 52 by applying the phrase ultimate fact to important factual questions or to the last factual determination in a given case, in order to justify plenary review of an issue" (628 F.2d at 491).

While the instant case is not one of employment discrimination, the issues of motivation, whether an employer in firing an employee or of an insurance company in refusing to defend its insured are identical. Moreover, because the instant case concerns a jury verdict rather than a judge's finding, the court's holding in *Van Ooteghen* is all the more compelling.

In *Van Ooteghen*, "the district court was faced with a clear factual choice: was Van Ooteghen fired for his mere absence from work regardless of the purpose of this absence or, alternatively, was the establishment of set working hours and the dismissal for their violation an attempt to prevent and punish his decision to speak to a political body on a controversial, political issue?" (628 F.2d at 491).

In the instant case, the jury was faced with an equally clear factual choice: Did a conflict of interest reasonably preclude USF&G from defending Hayes against plaintiff's main demand or, alternatively, was USF&G's refusal to defend, in fact, predicated upon the existence of the alleged conflict?

Given the evidence contained in the record of the trial, USF&G's overt attempt to destroy Hayes' interests and its continuous refusal to defend on the grounds of lack of coverage, the jury's verdict reflected its finding that USF&G's refusal to defend was *not* predicated upon the existence of an alleged conflict but, rather, on the grounds of lack of

coverage and was therefore unreasonable.

"The Seventh Amendment forbids appellate judges to sit as post-trial assessors and denies them the power to vacate awards because they might, as fact triers, have decided differently." *Dunn vs. Sears-Roebuck & Company*, 639 F.2d 1171 (5th Cir. 1981)."

"Thus, factual findings of a district court cannot be set aside on review unless clearly erroneous. The function of the reviewing court is not to retry the issues or to substitute its judgment for that of the district court." *Williamson vs. Brown*, 646 F.2d 196 (5th Cir. 1981).

USF&G originally denied coverage to Hayes on the basis that the policy covered accidents occurring only in Mississippi, in the face of clear language in the policy that accidents taking place outside of Mississippi "in operations necessary or incidental thereto" were also covered. USF&G continued to deny coverage even after this argument was decided in favor of Hayes on a motion for summary judgment.

USF&G not only refused to represent its insured, it also actively worked to Hayes' detriment by accusing Hayes of fraud and by attempting to side with plaintiff in the original demand.

Moreover, USF&G's claim that it offered to defend Hayes with a reservation of rights further reveals that it had no intention of representing its insured. The Louisiana Bar Association's Committee on Professional Responsibility Opinion No. 342 expressly states that:

"The Committee is of the opinion that it would be improper, with or without the consent of all parties concerned, for the same attorney to represent

both the insurer and the insured [where the insurer either denies coverage to the insured or reserves its rights to do so subsequently]...

The Committee feels that when coverage is disputed, the interests of the insured and the insurer are always divergent. The attorney should not be placed in the position of divided loyalties. Such an arrangement would be adverse to the best interests of the insured, the insurer, the attorney, and the profession.

Therefore, the Committee is of the opinion that the same attorney could not, under the circumstances presented, properly represent both the insurer and insured."

This opinion is binding upon all members of the Louisiana Bar Association, including counsel for USF&G. Moreover, this case presents a perfect example of why such representation with a reservation of rights cannot be tolerated. As the record reflects, USF&G's actions in this matter make it clear that had Hayes acceded to USF&G's wishes to defend with a reservation of rights, USF&G would have represented its own interests to the detriment of Hayes' interests. How the Court of Appeals could ignore this apparent breach of ethics by counsel for USF&G and cite with apparent approval USF&G's offer to defend with a reservation of rights defies all logic.

The record of this case demonstrates an undeniable course of conduct on the part of USF&G which was expressly designed to intimidate and oppress its insured and to deprive Hayes of its contractual rights to be defended by its insurer and to be covered by said insurer should it be cast in judgment. More importantly, the actions of USF&G, as reflected in the record, provide the factual basis for the jury's

conclusion that USF&G did not have a "legitimate or arguable reason" for refusing to assume Hayes' defense. This course of conduct, totally ignored by the Court of Appeals, formed the basis of the punitive damages award. It was a factual finding totally independent of the question of conflict of interest, a question which, in fact, was never raised at the trial of this matter.

"In reviewing the trial court, we must weigh conflicting evidence and inferences most favorably to the prevailing party. If there is any substantial evidence in the record to support the jury's verdict, we must affirm the judgment." *Spray-Rite Service Corp. vs. Monsanto Company*, 684 F.2d 1226 (7th Cir. 1982) [citations omitted].

CONCLUSION

These well established principals were violated by the Court of Appeals in reversing the verdict of the jury in the present action. The disputes concerning the existence of a conflict of interest and whether such a conflict of interest was the actual reason for USF&G's conduct were factual questions which are to be and were, in fact, decided by the jury. For the Court of Appeals to override these factual findings, especially where supported by overwhelming evidence, far exceeds the scope of proper appellate review and effectively denies petitioner the right to a trial by jury as provided by the Seventh Amendment of the Constitution of the United States. For these reasons, this Court must grant Certiorari in order to insure that Petitioner's right to a jury trial is not abrogated.

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Phone: (504) 833-8241

CERTIFICATE OF SERVICE

The undersigned hereby certifies that three copies of the foregoing Petition for Writ of Certiorari have been served upon Charles L. Chassaignac, counsel for USF&G, at his post office address of 1500 First National Bank of Commerce Building, New Orleans, Louisiana, 70112, by placing same in the United States mail, first-class postage prepaid.

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A-1

APPENDIX "A"

Ronnie EZELL, Plaintiff,

v.

HAYES OILFIELD CONSTRUCTION CO., INC.,

Defendant-Appellee

Cross-Appellant,

v.

UNITED STATES FIDELITY & GUARANTY CO.,

Defendant-Appellant

Cross-Appellee.

Nos. 81-3391, 81-3457.

United States Court of Appeals
Fifth Circuit

Dec. 13, 1982.

Employee brought Jones Act claim against employer and, when employer's insurer refused to defend, employer joined insurer as third-party defendant. At trial in the United States District Court for the Eastern District of Louisiana at New Orleans, George Arceneaux, Jr., J., jury awarded attorney fees and punitive damages to employer on the third-party claim, and punitive damages award was reduced by remittitur, and employer and insurer appealed. The Court of Appeals, Goldberg, Circuit Judge, held that insurer's refusal to assume defense was reasonable as a matter of law in light of conflict of interest between itself and its insured, and thus punitive damages could not be assessed for refusal to defend.

Affirmed in part and reversed in part.

Chaffe, McCall, Phillips, Toler & Sarpy, Peter A. Feringa, Jr., Charles L. Chassaignac, J. Dwight LeBlanc, Jr., New Orleans, La., for defendant-appellant cross-appellee.

Bailey & Leininger, B. Ralph Bailey, Robert C. Leininger, Jr., Metairie, La., for defendant-appellee cross-appellant.

Appeals from the United States District Court for the Eastern District of Louisiana.

Before GOLDBERG, WILLIAMS and GARWOOD,
Circuit Judges.

GOLDBERG, Circuit Judge:

This is an appeal from a jury verdict awarding punitive damages to an insured party in a diversity action against its insurer for breach of the insurer's duty to defend the insured. Ronnie Ezell, an employee of Hayes Oilfield Construction, Inc. ("Hayes"), was injured on the job and sued Hayes. United States Fidelity & Guaranty Co. ("USF & G"), Hayes' insurance carrier, notified Hayes that USF & G would not defend the suit. Hayes joined USF & G as a third-party defendant, claiming the costs of Hayes' defense against Ezell's claim and claiming punitive damages for USF & G's failure to defend. The claim by Ezell against Hayes was settled before trial. At trial the jury awarded attorney's fees and punitive damages to Hayes; the punitive damage award was reduced by remittitur. Both USF & G and Hayes appeal from this judgment.

I. BACKGROUND

A. Facts

On February 17, 1978, USF & G issued an insurance policy to Hayes which provided in part:

INSURANCE AGREEMENTS

I. Coverage A—Workmen's Compensation

To pay promptly when due all compensation and other benefits required of the Insured by the workmen's compensation law.

Coverage B—Employers' Liability

To pay on behalf of the Insured all sums which the Insured shall become legally obligated to pay as damages because of bodily injury by accident or disease, including death at any time resulting therefrom:

(a) sustained in the United States of America, its territories or possessions, or Canada by any employee of the Insured arising out of and in the course of his employment by the Insured either in operations in [Mississippi] or in operations necessary or incidental thereto;

* * * * *

II. Defense, Settlement, Supplementary Payments

As respects the insurance afforded by the other terms of this policy the Company shall:

(a) defend any proceeding against the Insured seeking such benefits and any suit against the Insured alleging such inquiry and seeking damages on account thereof, even if such proceeding or suit is groundless, false or fraudulent; but the Company may make such investigation, negotiation and set-

tlement of any claim or suit as it deems expedient;

* * * * *

III. Definitions

(a) Workmen's Compensation Law. The unqualified term "workmen's compensation law" means the workmen's compensation law or worker's compensation law and any occupational disease law of [Mississippi], but does not include those provisions of any such law which provide non-occupational disability benefits.

* * * * *

EXCLUSIONS

This policy does not apply:

* * * * *

(f) under Coverage B, to any obligation for which the Insured or any carrier as his insurer may be held liable under the workmen's compensation or occupational disease law of [Mississippi], any other workmen's compensation or occupational disease law, any unemployment compensation or disability benefits law, or under any similar law.

Record at I-151.

The application for insurance described Hayes operations as "Clearing of Roadway & Drilling Site & Reclamation of Land After Operations Completed." Record at I-164.

In April, 1978, Ezell was injured during the course of his employment by Hayes. He initially claimed he injured his back lifting some pipe in Hayes' work yard in Mississippi. Ezell filed a claim for this injury with the Mississippi

Workmen's Compensation Commission, and USF & G paid the claim. On June 5, 1978, Ezell filed suit against Hayes and other companies, alleging a different set of facts to support his claims. This second version stated that Ezell hurt his back while working for Hayes on a barge off the Louisiana coast. Ezell claimed he had lied on his Mississippi claim at the urging of Hayes because Hayes wanted to keep its insurance premiums low.

USF & G refused to assume Hayes' defense in this action by Ezell because (1) the geographical limitations of Hayes' policy excluded coverage for accidents outside Mississippi; (2) Hayes had misrepresented the nature of its business in its application for insurance; (3) Hayes and USF & G had available conflicting defenses. USF & G offered to defend Hayes under a reservation of rights and also agreed to compensate Hayes for its expenses in defending the suit. Hayes was unsatisfied with both of these offers and filed a third-party complaint against USF & G.

B. Proceedings Below

Ezell filed an action against Hayes and others in United States District Court for the District of Louisiana, on June 5, 1978, alleging a Jones Act claim, 46 U.S.C. § 688 (1976). When USF & G declined to defend Hayes in this original action, Hayes filed a third-party complaint against USF & G seeking a declaratory judgment that Ezell's claim was covered under the insurance policy, and seeking attorney's fees and punitive damages. USF & G filed a motion for summary judgment based on its allegation that Ezell's claim against Hayes was not covered under the policy. Hayes also filed a motion for summary judgment that the claim was covered. The district court ruled that Ezell's Jones Act claim for the accident allegedly occurring in Louisiana was

covered by the policy. USF & G does not appeal from this partial summary judgment for Hayes.¹ USF & G still declined to represent Hayes after the partial summary judgment.

Prior to trial, USF & G settled Ezell's original claim and paid him. Thus, at the trial the only remaining issues were the amount of attorney's fees due Hayes and punitive damages. The jury returned a verdict awarding attorney's fees of \$2,244.26 more than the \$17,611.30 USF & G had already agreed to pay Hayes. The jury also awarded \$2 million in punitive damages. This was reduced by remittitur to \$500,000 and judgment was entered. Both USF & G and Hayes now appeal from this judgment.

C. Issues on Appeal

USF & G is primarily disturbed by the award of punitive damages. First, USF & G argues that punitive damages are inappropriate because USF & G was justified in its refusal to defend. Next, USF & G contends that punitive damages are unavailable as a remedy for an insurer's failure to defend a claim. Third, USF & G claims that the district court committed several prejudicial errors calling for a new trial, and, finally, that the punitive damages awarded were excessive as a matter of law. Hayes appeals from the remittitur and denial of pre-judgment interest.

We agree with USF & G that its refusal to defend

¹ The district court also certified this partial summary judgment as a final judgment under Fed.R.Civ.P. 54(b). We note in passing that this certification was of dubious validity, because the partial summary judgment certainly did not settle the controversy between Hayes and USF & G. See, e.g., *Liberty Mutual Insurance Co. v. Wetzel*, 424 U.S. 737, 744, 96 S.Ct. 1202, 1206, 47 L.Ed.2d 435 (1976). This point is of solely academic interest in light of USF & G's failure to appeal this aspect of the judgment below.

was justified and, thus, that punitive damages are unavailable as a matter of law. Accordingly, we do not reach the other issues.

II. CHOICE OF LAW

The court below applied Mississippi law, based on a stipulation of the parties that Mississippi law would apply. On appeal, USF & G argues that Louisiana law should apply, despite the stipulation. Our jurisdiction in this case is based upon diversity, and federal courts sitting in diversity must apply the conflict of laws rules of the forum state. *Klaxon Co. v. Stentor Electric Manufacturing Co.*, 313 U.S. 487, 61 S.Ct. 1020, 85 L.Ed. 1477 (1941). Thus, Louisiana conflict of laws rules apply to the choice of law.²

Determining what those conflict of laws rules are and applying them to the facts of this case is a task of great difficulty for federal judges unaccustomed to treading the narrow path of civil law. Exacerbating the perils of our trek is the fact that the Louisiana courts themselves exhibit uncertainty regarding which choice of law rules they would apply to a case like this one. Compare *U.S. Leasing Corp. v. Keiler*, 290 So.2d 427 (La.App.1979) (apply law of forum state to determine remedy) with *Wickham v. Prudential Insurance Co.*, 366 So.2d 951, 954 (La.App.1978) (following Restatement (Second) of Conflict of Laws, applying law of state with most contacts to the contractual relationship). See also *Delhomme Industries, Inc. v. Houston Beechcraft, Inc.*, 669 F.2d

² Louisiana does allow parties to agree *contractually* to what state's law would be applied to resolution of contractual disputes. See, e.g., *Associated Press v. Toledo Investments, Inc.*, 389 So.2d 752, 754 (La.App.1980); *Davis v. Humble Oil & Ref. Co.*, 283 So.2d 783, 788 (La.App.1973). The pretrial stipulation in this case that Mississippi law would apply, however, is not a contractual provision and is no more binding on us than any pretrial stipulation as to the content of Louisiana law.

1049, 1055-57 (5th Cir. 1982) (federal court attempting to discern Louisiana rules). Fortunately, a path is available to us that enables us to travel around this Louisiana swamp.

Happily, it is the case that both Louisiana and Mississippi provide the same law (and lack of law) on the dispositive questions in this case, so we need not attempt to choose between the two. The first dispositive question here is whether punitive damages are available for USF & G's refusal to defend Hayes. Both Mississippi and Louisiana would not allow punitive damages for a reasonable refusal to defend. *See, e.g., La.Rev.Stat.Ann. §22:658* (West 1978); *Eymard v. C & W Well Servicing, Inc.*, 258 So.2d 406 (La.App.), *writ ref'd*, 261 La. 465, 259 So.2d 915 (1972); *Standard Life Insurance Co. v. Veal*, 354 So.2d 239 (Miss.1978); *Mavar Shrimp & Oyster Co. v. United States Fidelity & Guaranty Co.*, 187 So.2d 871 (Miss.1966). Furthermore, our research reveals no law in either state that would guide our inquiry into the second dispositive question: When does a conflict of interest between the insurer and insured justify the insurer's refusal to defend? Accordingly, on that issue we must be guided by general principles of insurance law. Thus, a decision of which state's law a Louisiana court would apply would not assist in the resolution of this case, so we decline to decide that preliminary question.

III. WAS USF & G'S REFUSAL TO DEFEND JUSTIFIED?

A. The Duty to Defend

One of the major contractual rights secured to Hayes by its insurance policy with USF & G was that USF & G assumed the responsibility of defending any claim made against Hayes within the coverage of the policy, even if

fraudulent or frivolous.³ See generally 7C J. Appleman, *Insurance Law and Practice* (W. Berdal ed. 1979). The primary consideration in evaluating an insurer's duty to defend is whether the pleadings allege a claim within the scope of the coverage of the insurance policy. See *id.* §§ 4682-4686.

Even if the pleadings do state a claim within the policy's coverage, however, the insurer and insured may have conflicting interests in the management of the defense. For example, if the plaintiff urges alternative claims, only one of which would be covered, the insurer might have an interest in arguing that the true state of affairs establishes the claim not covered. This would not be very satisfactory to the insured. If the insurer simply assumes the defense, the insurer has control over the defense, but must provide a defense for the best interests of the insured. See *id.* § 4681. There are various ways of handling this problem, such as the insurer defending under a reservation of rights. See *id.* § 4694. Alternatively, the insured may retain separate counsel.

The duty to defend is not breached where the insurer refuses to defend because of a conflict of interest. Thus, although the insurer is not required to defend where there is a conflict of interest, it is not relieved from reimbursing the insured for costs in defending the claim alleged to be within the policy.

Id. at § 4685.01, at 141 (footnote omitted). Thus, the inquiry regarding duty to defend has at least two steps: (1) is the claim within the policy coverage; (2) is there a conflict.

³ The policy provided that USF & G would "defend any proceeding against the Insured seeking such benefits and any suit against the Insured alleging such injury and seeking damages on account thereof, even if such proceeding or suit is groundless, false, or fraudulent." Record at I-151 (Insuring Agreement II(a)).

B. The Scope of Coverage

USF & G has at least two lines of defense for its position that it was justified in its refusal to defend. First, it argued that Ezell's Jones Act claim was outside the scope of Hayes' policy. The policy covers liability for events occurring in Mississippi, with coverage for events outside Mississippi only if incidental to operations within Mississippi. Ezell claimed that he was injured while unloading a barge offshore of Louisiana. USF & G moved for summary judgment on the theory that this claim fell outside the geographic limitations of the policy. Hayes also moved for summary judgment that the claim was covered, based on the theory that the Louisiana contract was incidental to work in Mississippi.

The trial judge granted Hayes' motion and denied USF & G's motion.⁴ This ruling established coverage, and apparently for the trial judge and Hayes this ruling also established the duty of USF & G to defend Hayes.

C. The Conflict

USF & G's second line of defense was that a conflict of interest between USF & G and Hayes excused USF & G from assuming the defense—USF & G did not accept the idea that a mere finding of coverage implied it then had a duty to assume the defense of Hayes. USF & G believed that it had a defense available to it that was in conflict with the defenses available to Hayes. Because Hayes refused to allow USF & G to defend under a reservation of rights, USF & G felt it was inappropriate to assume Hayes' defense. If USF & G was correct regarding this conflict, then punitive

⁴ As mentioned earlier, USF & G does not now appeal from the finding of coverage.

damages would be improper, so we must now investigate the claimed conflict.

The first key to the conflict is that Ezell's status as a seaman under the Jones Act was very much in doubt. At the time of the accident Ezell was unloading sacks of drilling mud from a barge in a Louisiana waterway. Record at III-183. If Ezell were not a Jones Act seaman, his status would probably be that of a longshoreman under the Longshoremen's and Harbor Workers' Compensation Act, 33 U.S.C. §§ 901-950 (1976). Liability under this Act is available without fault, *id.* § 904, and defenses such as negligence of a fellow servant, assumption of risk, and contributory negligence are not available to the employer. *Id.* § 905(a). Furthermore, liability under the Act is exclusive. *Id.* Thus, it would have been unfortunate for Hayes had Ezell been found to be a longshoreman under the Act.

The second key to the conflict is that Hayes' policy with USF & G did not cover liability under the Longshoremen's and Harbor Workers' Compensation Act. The policy had two basic types of coverage. Coverage A covered only Mississippi workmen's compensation claims. Coverage B covered claims for injury by accident or disease from operations in Mississippi or elsewhere if necessary or incidental to operations in Mississippi. This is not the end of the story, however, because Exclusion (f) specifically removes any kind of workmen's compensation claim from the scope of Coverage B. See Record at I-151. The Longshoremen's claim is not covered under Coverage A and is removed from Coverage B by Exclusion (f). Counsel for Hayes admitted at trial that Hayes had no coverage for a Longshoremen's claim. Record at IV-121. Thus, it would have been fortunate for USF & G if Ezell were found to be a longshoreman, because that liability is exclusive and not covered by USF & G's policy

for Hayes.⁵

These two factors clearly show the conflict of interest between USF & G and Hayes. USF & G would have been quite happy to defend on the theory that Ezell was a longshoreman; Hayes would not have liked that strategy. Thus, USF & G could not adequately defend both itself and Hayes in the lawsuit, except under a reservation of rights. Given this conflict, we hold that USF & G's refusal to assume Hayes' defense was reasonable as a matter of law. Because USF & G's actions were reasonable and punitive damages may not be assessed for a reasonable refusal to defend, it was error to allow the issue of punitive damages to go to the jury.⁶

CONCLUSION

The insured's right to have the insurer defend claims against the insured is a valuable contract right. The right to have the insurer *pay* for the defense is predicated solely on coverage. The trial court here found, on motion for summary judgment, that the claim made against the insured was covered. USF & G does not appeal that finding. Accordingly, USF & G is liable for Hayes' attorney's fees in defending the claim. USF & G has paid these fees and does not contest its obligation in that regard. The right of the insured to have the insurer *assume* the defense, however, further requires that the insurer and the insured have no conflict of interest. Here the insurer and the insured had a conflict: Hayes did not have coverage under the Longshoremen's and Harbor

⁵ The fact that Ezell was not pursuing such a claim in the lawsuit is irrelevant. From USF & G's point of view, an excellent defense to Ezell's Jones Act claim would have been to show that Ezell was a longshoreman.

⁶ This disposition makes it unnecessary for us to reach any of the other arguments by either USF & G or Hayes.

Workers' Compensation Act, making a defense that Ezell, the original plaintiff, was a longshoreman acceptable to USF & G but unacceptable to Hayes. In the presence of such a conflict the insured has only the right to demand that the insurer assume the defense under a reservation of rights. Because Hayes was not willing to do this, USF & G was justified in refusing to assume the defense. Punitive damages are not available for a justifiable refusal to defend.

AFFIRMED IN PART and REVERSED IN PART.

APPENDIX "B"

DIST/OFFICE	DOCKET	FILING D.
053L 2	YR. NUMBER	MO. DAY
	78	1813 06 05
		78 3 340 1

DEMAND	JUDGE	JURY	DOCKET
OTHER	NUMBER	DEM.	YR. NUMBER
400	3L11	P	78 1813

78-1813
KF (2)
JURY

PLAINTIFFS
RONNIE EZELL

DEFENDANTS
HAYES OILFIELD CONSTRUCTION, INC.
MARION OIL COMPANY
DIAMOND M. COMPANY
HALLIBURTON COMPANY

3rd Pty Deft:
UNITED STATES FIDELITY & GUARANTY

THIRD PARTY COMPLT. 11-2-79
JAMES H. CUMMINS

CAUSE
MARINE, INJURY, SEAMAN, JONES ACT

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For: U.S. Fidelity

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New Orleans, La. 70112
561-8989

For: Marion Oil

SEE ADDITIONAL SHEET FOR ATTORNEYS

WEDNESDAY, APRIL 16, 1980 10AM

1. MIN OF DEFT. U.S. FIDELITY & GUARANTY CO.
FOR SUMMARY JUDGMENT.
 2. MIN OF HAYES OILFIELD CONTRACTORS, INC.
FOR SUMMARY JUDGMENT.

ORDERED

2. X GRANTED ___ DENIED AS MOOT
 1. X DENIED ___ DISMISSED AS
 MOOT

— No Opposition

1 & 2 X Argument

— Submitted on Briefs

— Continued to _____
Submitted _____

Additional briefs to be filed by

Reply briefs to be filed by

X Reasons given Orally by the Court

Written reasons to be issued by Court

A-17

— FURTHER ORDERED _____

DATE OF ENTRY APR 22 1980

APPENDIX "C"

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

RONNIE EZELL

CIVIL ACTION

versus

NO. 78-1813

**HAYES OILFIELD
CONSTRUCTION, INC., MARION
OIL COMPANY, DIAMOND M.
COMPANY, HALLIBURTON COMPANY**

SECTION "K" (2)

JUDGMENT

This cause coming on to be heard on petition of defendant and third-party plaintiff, Hayes Oilfield Construction Company, Inc., for a determination and finding under Rule 54(b) of the Federal Rules of Civil Procedure, and the Court having heard the arguments of counsel and being fully advised in the premises doth find:

1. That on April 16, 1980, an order was entered by this Court in this cause granting the motion for summary judgment of Hayes Oilfield Construction Company, Inc. declaring that the policy of insurance issued by USF&G to Hayes Oilfield Construction Company, Inc. afforded coverage for the claims of plaintiff in the main demand;
2. That this is a multiple claims action, more than one claim for relief being presented therein and that in and by the aforesaid order, the Court did not make the express determination of finding contemplated by said Rule 54(b);
3. That there is no just reason for delay with respect to the entry of judgment in favor of Hayes Oilfield Con-

struction Company, Inc. and against USF&G;

IT IS THEREFORE ORDERED pursuant to Rule 54(b) of the Federal Rules of Civil Procedure that the judgment order of this Court dated April 16, 1980 is a final judgment in this action in favor of Hayes Oilfield Construction Company, Inc. and against USF&G declaring that the policy of insurance issued by USF&G to Hayes Oilfield Construction Company, Inc. provides coverage to Hayes Oilfield Construction Company, Inc. for the claims asserted by the plaintiff in the main demand.

New Orleans, Louisiana, this 27th day of May, 1980.

UNITED STATES DISTRICT JUDGE

APPENDIX "D"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE EZELL

CIVIL ACTION

VERSUS

NO. 78-1813

HAYES OILFIELD
CONSTRUCTION, INC., et al

SECTION "K"

JUDGMENT

Considering the stipulation of the parties, and the answers returned by the jury to the interrogatories propounded by the Court on February 10, 1981;

IT IS ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third party plaintiff, Hayes Oilfield Construction, Inc., and against third party defendant, United States Fidelity and Guaranty Co., in the amount of \$17,611.30, as per stipulation of the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third party plaintiff, Hayes Oilfield Construction, Inc., and against third party defendant, United States Fidelity and Guaranty Co., in the amount of \$2,002,244.26 with interest at the rate of eight (8) percent per annum from date of judgment and costs.

New Orleans, Louisiana, this 27 day of February, 1981.

UNITED STATES DISTRICT JUDGE

APPENDIX "E"

DIST/OFFICE	DOCKET	FILING D.
	YR. NUMBER	MO. DAY
053L 2	78	1813 06 05
		78 3 340 1

DEMAND	JUDGE	JURY	DOCKET
OTHER	NUMBER	DEM.	YR. NUMBER
400	3L11	P	78 1813

78-1813
KF (2)
JURY

PLAINTIFFS
RONNIE EZELL

INTERVENTION 9/5/80:

United States Fidelity & Guaranty Company

DEFENDANTS
HAYES OILFIELD CONSTRUCTION, INC.
MARION OIL COMPANY
DIAMOND M. COMPANY
HALLIBURTON COMPANY

3rd Pty Deft:
UNITED STATES FIDELITY & GUARANTY CO.

THIRD PARTY COMPLT: 11-2-79
JAMES H. CUMMINS

CAUSE
MARINE, INJURY, SEAMAN, JONES ACT

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833-8241

J. Dwight LeBlanc, Jr.

J. Francois Allain
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For: U.S. Fidelity

Wood Brown, III, Stanley McDermott
MONTGOMERY, BARNETT, BROWN & READ
804 National Bank of Comm. Bldg.
New Orleans, La. 70112
561-8989
For: Marion Oil

SEE ADDITIONAL SHEET FOR ATTORNEYS

WEDNESDAY, MARCH 18, 1981 10AM

1. MIN OF UNITED STATES FIDELITY & GUARANTY CO. FOR JUDGMENT NOV: MIN FOR NEW TRIAL OR MIN FOR REMITTITUR
2. MIN OF HAYES OILFIELD FOR JUDGMENT N.O.V.; TO ALTER OR AMEND JUDGMENT & FOR ADDITUR.

ORDERED

- | | |
|---|---|
| <p><input type="checkbox"/> GRANTED
1 & 2 <input checked="" type="checkbox"/> DENIED</p> <p><input type="checkbox"/> No Opposition
<input checked="" type="checkbox"/> Argument
<input type="checkbox"/> Submitted on Briefs
<input type="checkbox"/> Continued to _____</p> <p><input checked="" type="checkbox"/> Submitted AS TO MIN FOR REMITTITUR: MOVER
TO FILE MEMO WITHIN 14 DAYS</p> | <p><input type="checkbox"/> DENIED AS MOOT
<input type="checkbox"/> DISMISSED AS
MOOT</p> |
|---|---|

Additional briefs to be filed by HAYES TO FILE REPLY
7 DAYS LATER.

Reply briefs to be filed by _____

— Reasons given Orally by the Court

— Written reasons to be issued by Court.

— FURTHER ORDERED _____

A-25

APPENDIX "F"

MINUTE ENTRY
ARCENEAUX, J.
MARCH 27, 1981

RONNIE EZELL

CIVIL ACTION

VERSUS

NO. 78-1813

HAYES OIL FIELD CONSTRUCTION
CO., INC., ET AL.

SECTION "K"

IT IS ORDERED that the minute entry denying defendant United States Fidelity & Guaranty Co.'s Motion for New Trial and/or for a Judgment Notwithstanding the Verdict or for Remittitur be VACATED; entry of judgment on these motions is stayed pending submission of supplemental memoranda and a ruling thereon.

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APPENDIX "G"

DIST/OFFICE	DOCKET	FILING D.
	YR. NUMBER	MO. DAY
053L 2	78	1813 06 05
	78	3 340 1

DEMAND	JUDGE	JURY	DOCKET
OTHER	NUMBER	DEM.	YR. NUMBER
400	3L11	P	78 1813

78-1813
KF (2)
JURY

PLAINTIFFS
RONNIE EZELL

INTERVENTION 9/5/80:

United States Fidelity & Guaranty Company

DEFENDANTS
HAYES OILFIELD CONSTRUCTION, INC.
MARION OIL COMPANY
DIAMOND M. COMPANY
HALLIBURTON COMPANY

3rd Pty Deft:
UNITED STATES FIDELITY & GUARANTY CO.

THIRD PARTY COMPLT: 11-2-79
JAMES H. CUMMINS

CAUSE
MARINE, INJURY, SEAMAN, JONES ACT

ATTORNEYS

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New Orleans, La. 70112
566-1311
For: Halliburton

Doug Wade
370 Providence Capitol Building
Jackson, Ms. 39201
601-354-8930
For: Hayes Oil Field Construction

Hayes Oil Field Const. Co.
112 Main Street
Brookhaven, Ms. 39601

B. Ralph Bailey
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Suite 605
Met., La.
For: Hayes Oilfield
833-8241

J. Dwight LeBlanc, Jr.

J. Francois Allain
CHAFFE, McCALL, PHILLIPS
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New Orleans, La. 70112
For: U.S. Fidelity

Wood Brown, III, Stanley McDermott
MONTGOMERY, BARNETT, BROWN & READ
804 National Bank of Comm. Bldg.
New Orleans, La. 70112
561-8989
For: Marion Oil

SEE ADDITIONAL SHEET FOR ATTORNEYS

WEDNESDAY, APRIL 29, 1981 4 PM

MOTION FOR REMITTUR.

ORDERED

GRANTED

DENIED AS MOOT

DENIED

DISMISSED AS
MOOT

No Opposition

Argument

Submitted on Briefs

Continued to _____

Submitted _____

Additional briefs to be filed by _____

Reply briefs to be filed by _____

Reasons given Orally by the Court.

Written reasons to be issued by Court.

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X FURTHER ORDERED jury verdict of \$2,000,000 remitted to \$500,000.

APPENDIX "H"

**UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA**

RONNIE EZELL

CIVIL ACTION

versus

NUMBER: 78-1813

**HAYES OILFIELD CONSTRUCTION
CO., INC., ET AL**

SECTION: "K" (2)

REMITTITUR

Third-party plaintiff, Hayes Oilfield Construction Co., Inc., by its attorney undersigned, and pursuant to the Order entered by the Court herein on the 29th day of April, 1981, does hereby, file this, its remittitur, remitting all of the punitive damage verdict herein in excess of the sum of \$500,000.00, reserving all rights with respect to the separable and divisible claims for attorney's fees for the collection of the punitive damage award, pre-judgment interest, and this Court's power or authority to grant a remittitur in this cause.

BAILEY & LEININGER
BY: B. RALPH BAILEY
B. RALPH BAILEY
3445 N. Causeway Boulevard
Suite 605
Metairie, Louisiana 70002
Telephone: 833-8241
Attorney for Third-party
Plaintiff

APPENDIX "I"

DIST/OFFICE	DOCKET	FILING D.
	YR. NUMBER	MO. DAY
053L 2	78 1813	06 05 78 3 340 1

DEMAND	JUDGE	JURY	DOCKET
OTHER	NUMBER	DEM.	YR. NUMBER
400	3L11	P	78 1813

78-1813
KF (2)
JURY

PLAINTIFFS
RONNIE EZELL

INTERVENTION 9/5/80:

United States Fidelity & Guaranty Company

DEFENDANTS
HAYES OILFIELD CONSTRUCTION, INC.
MARION OIL COMPANY
DIAMOND M. COMPANY
HALLIBURTON COMPANY

3rd Pty Deft:
UNITED STATES FIDELITY & GUARANTY CO.

THIRD PARTY COMPLT. 11-2-79
JAMES H. CUMMINS

CAUSE
MARINE, INJURY, SEAMAN, JONES ACT

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Thomas J. Wagner
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566-1311
For: Halliburton

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370 Providence Capitol Building
Jackson, Ms. 39201
601-354-8930
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For: Hayes Oilfield
833-8241

J. Dwight LeBlanc, Jr.
J. Francois Allain
CHAFFE, McCALL, PHILLIPS

1500 FNBC Building
New Orleans, La. 70112
For: U.S. Fidelity

Wood Brown, III, Stanley McDermott
MONTGOMERY, BARNETT, BROWN & READ
804 National Bank of Comm. Bldg.
New Orleans, La. 70112
561-8989
For: Marion Oil

SEE ADDITIONAL SHEET FOR ATTORNEYS

WEDNESDAY, JUNE 24, 1981 10AM

MIN OF U.F.S. & G. FOR JUDGMENT N.O.V. OR MIN
FOR NEW TRIAL OR MIN FOR RELIEF FROM
JUDGMENT.

ORDERED

GRANTED
 DENIED

DENIED AS MOOT
 DISMISSED AS
MOOT

- No Opposition
 Argument
 Submitted on Briefs
 Continued to _____
 Submitted _____
-

Additional briefs to be filed by _____
Reply briefs to be filed by _____
 Reasons given Orally by the Court.
 Written reasons to be issued by Court.

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— FURTHER ORDERED _____

APPENDIX "J"

RONNIE EZELL

CIVIL ACTION

VERSUS

NO. 78-1813

HAYES OILFIELD CONSTRUCTION,
INC., ET AL

SECTION "K"

COURT'S RULING ON MOTION OF U.S.F. & G.
FOR JUDGMENT N.O.V.,
OR MOTION FOR NEW TRIAL,
OR MOTION FOR RELIEF FROM JUDGMENT,
HELD ON JUNE 24, 1981

BEFORE: THE HONORABLE GEORGE ARCENEAUX,
JR., UNITED STATES DISTRICT JUDGE

NEW ORLEANS, LOUISIANA.

APPEARANCES:

For Hayes Oilfield Construction, Inc.:

MESSRS. BAILEY & LEININGER
Attorneys at Law
3445 N. Causeway Boulevard, Suite 605
Metairie, Louisiana 70002
(BY: B. RALPH BAILEY)

For U.S. Fidelity & Guaranty:

MESSRS. CHAFFE, McCALL, PHILLIPS, TOLER &
SARPY
Attorneys at Law
1500 First National Bank of Commerce Building
New Orleans, Louisiana 70112
(BY: J. DWIGHT LeBLANC, JR.
and
J. FRANCOIS ALLAIN)

PROCEEDINGS

THE COURT: All right, gentlemen. First of all, as I have indicated earlier, I'm not unfamiliar with this entire matter. I have, again, however, read the memoranda, reviewed the record, and at this time I am prepared to rule on all three of these motions. First of all, the motion for judgment N.O.V. is denied. The alternative, amended motion for a new trial is denied.

The most serious contention, I feel, arises under the motion for relief from judgment predicated upon the alleged violation of the disciplinary rules and ethical rules and ethical considerations of the Code of Professional Responsibility. I again have reviewed the record, and I have particularly reviewed the testimony, a transcript of which was attached to the mover's motion.

I wish there were a simple and easy answer. I attempted on previous occasions, in discussions with counsel, to achieve that. The record will show that the original Jury verdict in this case was remitted to the sum of a half million dollars, which remittance has been accepted by the plaintiff, and apparently that has been to no avail. So at a point like this, it's necessary, as the expression goes, to take the bull by the horns and do what I feel is just, proper, and right, and again, to mix a metaphor, at the risk of sounding trite, to let the hide go with the hair.

Under the circumstances, being aware of the Rules in Gutierrez, but being also aware of the fact that Mr. Bailey apparently proceeded beyond the scope of my original instructions to him in testifying, but this was done without objection, or in a position of no objection except as to relevancy by counsel for the mover, it will be the judgment of this

Court that the third alternative motion for relief from judgment is likewise denied.

REPORTER'S CERTIFICATE

I, Delmer R. Simpson, CSR, Official Court Reporter for the United States District Court for the Eastern District of Louisiana, appointed pursuant to the provisions of Title 28, United States Code, Section 753, do hereby certify that the foregoing is a full, true and correct transcript of the ruling of the Court had in the within-entitled and numbered case on the date hereinbefore set forth; and I do further certify that the foregoing transcript has been prepared by me or under my direction.

/S/ DELMER R. SIMPSON

Delmer R. Simpson, CSR
Official Court Reporter

APPENDIX "K"

UNITED STATES DISTRICT COURT
EASTERN DISTRICT OF LOUISIANA

RONNIE EZELL

CIVIL ACTION

VERSUS

NO. 78-1813

HAYES OILFIELD CONSTRUCTION,
INC., et al

SECTION "K"

JUDGMENT

The Court on April 29, 1981 granted the motion of third party defendant, United States Fidelity and Guaranty Co. for remittitur. Third party plaintiff, Hayes Oilfield Construction, Inc. filed an acceptance of said remittitur.

Now, therefore the judgment entered by the Court on March 2, 1981 is hereby vacated and set aside and the following judgment is hereby entered;

IT IS ORDERED, ADJUDGED AND DECREED
that there be judgment in favor of third party plaintiff, Hayes Oilfield Construction, Inc., and against third party defendant, United States Fidelity and Guaranty Co., in the amount of \$17,611.30, as per stipulation of the parties.

IT IS FURTHER ORDERED, ADJUDGED AND DECREED that there be judgment in favor of third party plaintiff, *Hayes Oilfield Construction, Inc.*, and against third party defendant, United States Fidelity and Guaranty Co., in the amount of \$502,244.26 with interest at the rate of eight (8) percent per annum from date of judgment and costs.

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New Orleans, Louisiana, this 17 day of July, 1981.

UNITED STATES DISTRICT JUDGE

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APPENDIX "L"

**IN THE UNITED STATES COURT OF APPEALS
FOR THE FIFTH CIRCUIT**

Nos. 81-3391

81-3457

RONNIE EZELL,

Plaintiff,

versus

HAYES OILFIELD CONSTRUCTION CO., INC.,

Defendant-Appellee,
Cross-Appellant,

versus

UNITED STATES FIDELITY & GUARANTY CO.,

Defendant-Appellant,
Cross-Appellee.

Appeals from the United States District Court for
the Eastern District of Louisiana

**ON PETITION FOR REHEARING AND
SUGGESTION FOR REHEARING EN BANC**

(Opinion December 13, 1982, 5 Cir., 1982, __ F.2d __).

(JANUARY 17, 1983)

Before GOLDBERG, WILLIAMS and GARWOOD, Circuit Judges.

PER CURIAM:

The Petition for Rehearing is DENIED and no member of this panel nor Judge in regular active service on the Court having requested that the Court be polled on rehearing en banc, (Rule 35 Federal Rules of Appellate Procedure; Local Fifth Circuit Rule 16), the Suggestion for Rehearing En Banc is DENIED.

In response to the Motion to Amend and Correct Judgment: The portion of the opinion, slip op. at 1071, reading:

Accordingly, USF&G is liable for Hayes' attorney's fees in defending the claim. USF&G has paid these fees and does not contest its obligation in that regard.

is amended to read:

Accordingly, USF&G is liable for Hayes' attorney's fees and expenses in defending the claim. USF&G does not seriously contest its obligation in that regard.

ENTERED FOR THE COURT.

United States Circuit Judge